Supreme Court, U.S.
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(2)

NO. 95-1537

IN THE SUPREME COURT OF THE UNITED STATES

GARY L. BROBSTON,

Petitioner

vs.

INSULATION CORPORATION OF AMERICA, INC.

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF

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4799

QUESTIONS PRESENTED:

1. WHETHER THE DISTRICT COURT PROPERLY DETERMINED THAT THERE WAS NO DIRECT EVIDENCE OF AGE DISCRIMINATION.

2. WHETHER THE DISTRICT COURT PROPERLY DETERMINED THAT PETITIONER FAILED TO ESTABLISHED A PRIMA FACIE CASE OF AGE DISCRIMINATION.

3. WHETHER THE DISTRICT COURT PROPERLY DETERMINED THAT RESPONDENT ESTABLISHED LEGITIMATE BUSINESS REASONS FOR THE TERMINATION, AND THAT AGE WAS NOT A DETERMINATIVE FACTOR IN THE TERMINATION OF PETITIONER.

LIST OF INTERESTED PARTIES

The Petitioner is Gary L. Brobston

The Respondent is Insulation Corporation of America, Inc.

Pursuant to Supreme Court Rules 14.1(b) and 29.6, Respondent, Insulation Corporation of America, Inc. has a parent corporation by the name of Northern Lehigh Erectors, Inc.

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NO. 95-1537

SUPREME COURT OF THE UNITED STATES

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Respondent

ON PETITION FOR WRIT CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF

OPINIONS AND JUDGMENTS IN THE COURT BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania authored by Magistrate Judge Arnold C. Rapoport is unreported and appears at page 1(a) of the Petitioner's Appendix. Furthermore, the decision of the United States Court of Appeals

for the Third Circuit authored by Judge Becker and joined by Judge Roth and Judge Lewis is not reported and appears at page 3(a) of the Petitioner's Appendix. Also, the United States Court of Appeals for the Third Circuit denied the Petitioner's "Motion to File Supplemental Appendix" on December 21, 1995. The Order is attached hereto at page 1(a) of the Respondent's Appendix.

COUNTER-STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

Petitioner, Gary L. Brobston seeks a Writ of Certiorari to review an order of the United States Court of Appeals for the Third Circuit which affirmed the United States District Court for the Eastern District of Pennsylvania's decision to grant Respondent's Motion for Summary Judgment. In essence, Petitioner has failed to establish a genuine issue of material fact regarding age discrimination because Respondent replaced Petitioner with an employee who was seven years older than he.

(Petitioner's Appendix at 16a-19a).

On August 13, 1993 Petitioner, Gary Brobston was terminated from his sales position at the Respondent's place of business for legitimate business reasons. Shortly thereafter, Petitioner wilfully violated the covenant not to compete in his employment contract by contacting Respondent's customers. Respondent sought a Preliminary Injunction against Petitioner in the Lehigh County Court of Common Pleas regarding the violation of the Covenant not to Compete. On December 17, 1993, a temporary order was granted pursuant to Respondent's Petition for the Preliminary Injunction. On December 30, 1993, Respondent's Request for a Preliminary Injunction was granted which enjoined the Petitioner from disclosing confidential business information and from competing with Respondent's customers. On November 3, 1995, the Pennsylvania Superior Court affirmed in part and reversed in part the trial court's decision. The Superior Court

affirmed the trial court's grant of a Preliminary Injunction as to the "non-disclosure" clause of the employment agreement and reversed the trial court's enforcement of the "non-competitive" clause. (See Insulation Corporation of America v. Brobston, 1995 WL 644094 (Nov. 3, 1995)).

On or about May 29, 1994, Petitioner filed a Complaint in the United States District Court for the Eastern District of Pennsylvania alleging that he was terminated on the basis of age in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. (hereinafter "ADEA"). During the course of the Petitioner's deposition, Respondent learned that Petitioner refused to return Respondent's confidential business records which were allegedly discovered by Petitioner in his closet at home. (Respondent's Memorandum of Law in Support of Motion for Summary Judgment at 5-Respondent's Appendix at 3(a)). On March 27, 1996, Petitioner was found in contempt of court

for failing to return Respondent's confidential business records. (Respondent's Appendix at 6(a)).

After working for Respondent since 1982, Petitioner's job position changed to Vice President of Specialty Products in November of 1992. Petitioner's new responsibilities included the following:

1) The development of new customers in Territory 60, which involved the sales of specialty products using a CAD computer system; and

2) The assumption of the job duties of a retiring employee, which involved the sale of existing commodity products in Territory 80. (Petitioner's Appendix at 7(a)-8(a)).

Petitioner was terminated in August of 1993 because of his inadequate performance in his position as Vice President of Specialty Products. Petitioner was terminated due to his failure to turn in weekly expense accounts, his inadequate amount of time spent on the road

visiting customers, his failure to follow Respondent's instructions, grossly deficient performance in Territory 60, and an overall inadequate amount of sales. (Petitioner Appendix at 8(a)).

B. CORRECTION OF MISSTATEMENTS IN THE PETITION

Pursuant to the United States Supreme Court Rule 15.2, Respondent brings the following misstatements of fact contained in the Petition to the Court's attention. Specifically, Petitioner alluded to certain information that was allegedly contained in an EEOC investigation file. (Petition at 6, 10). This information was never produced to the Respondent through the course of discovery during the trial court action. Also, the information was never made a part of the record that was before the United States District Court for the Eastern District of Pennsylvania or the Court of Appeals for the Third Circuit. Realizing this apparent error, counsel for Petitioner filed a "Motion to File Supplemental Appendix" with the Clerk of the

United States Court of Appeals for the Third Circuit. On December 21, 1995, said Motion was denied. (See Respondent's Appendix at 1(a)).

Petitioner further misleads this Court by alleging that he should have been given access to a "monthly product summary report" and that the District Court should have held an in camera inspection of records. However, Petitioner never filed a Motion to Compel the production of this alleged "monthly product summary report". Furthermore, Petitioner failed to file an Affidavit for a Continuance of the Determination of Respondent's Motion for Summary Judgment pursuant to F.R.Civ.P. 56(f) in order to obtain additional documents, take depositions or to formally request an in camera inspection of records. As a result, Petitioner has failed to preserve this issue on appeal.

Petitioner inaccurately asserts that the claims of Respondent's older worker, Michael Marsh, (who replaced the Petitioner) were based on hearsay. (Petition at 13). However, the

fact remains that the Respondent properly submitted an affidavit by Michael Marsh, pursuant to F.R.Civ.P. 56, which established that he assumed approximately 80-90% of Petitioner's responsibilities after termination. Indeed, the United States District Court properly found that Petitioner failed to established a prima facie case of age discrimination because Mr. Marsh, who was approximately seven years older than Petitioner, assumed a large majority of Petitioner's work duties.

Petitioner further misconstrues the law under the ADEA by condemning the District Court for "weighing" evidence at the summary judgment stage of the case. (Petition at 16-17). Pursuant to the ADEA, it was appropriate for the District Court to find that Respondent's legitimate business reasons for the termination were credible, and that the record was devoid of any pretext. Furthermore, it was proper for the Court to decide that there was no genuine issue

for trial because age was not a determinative factor in the termination of Petitioner.

REASONS FOR DENYING THE WRIT

I. THE DISTRICT COURT PROPERLY DETERMINED THAT THERE WAS NO DIRECT EVIDENCE OF AGE DISCRIMINATION.

Petitioner never established direct evidence of age discrimination. In response to the imminent dismissal of his lawsuit, Petitioner included a self-serving statement in his March 1994 affidavit. Petitioner alleged that Respondent's Chairman of the Board stated that Petitioner was being terminated because "I can hire a couple of young bucks for what I am paying you". (Petitioner Appendix at 14(a)). In his Petition, Petitioner misconstrues Healy v. New York Life Ins. Co., 860 F.2d 1209, (3d Cir. 1988). (See Petition at 8). The Healy case dealt with a post-hoc evaluation by the employer regarding the employee's performance. In the present case, however, Petitioner filed a self-serving affidavit that directly contradicted his prior sworn deposition

testimony.

Specifically, Petitioner testified at his deposition on February 10, 1995 as follows:

> Q. Did anyone at ICA ever tell you directly that the reason for your termination was because of how old you were?
>
> A. No.
>
> Q. Did you ever read any documentation that indicated directly that the reasons for your termination was because how old you were?
>
> A. I didn't read anything, no.

(Petitioner's Appendix at 14(a)-15(a)). Therefore, the allegations in Petitioner's affidavit directly contradicted his prior sworn deposition testimony. Furthermore, Respondent's corporate executives strongly denied that they ever verbalized such a statement. (Petitioner's Appendix at 15(a)-16(a)). Thus, the District Court determined that Petitioner's allegation was insufficient to constitute direct evidence of age discrimination. (Petitioner's Appendix at 16(a)).

In addition, Petitioner attempts to mislead this Honorable Court by alleging that the District Court ignored certain EEOC records. (Petition at 9). However, the alleged EEOC documents were never made a part of the record that was before the District Court or the Third Circuit Court of Appeals. In an effort to include said EEOC documents as part of the record, Petitioner filed a "Motion to File Supplemental Appendix". However, the Third Circuit Court of Appeals properly denied said Motion on December 21, 1995. (Respondent's Appendix at 1(a)).

Even if the statements in the Petitioner's Affidavit were considered, the statements do not meet the criteria of direct evidence of age discrimination. In Perry v. Prudential-Bache Securities, Inc., 738 F. Supp. 843 (D.N.J. 1989) aff'd. 904 F.2d 696 (3d Cir. 1990) cert. denied 498 U.S. 958, 112 L.Ed.2d 397, 111 S.Ct. 386 (1990), the Court found that certain statements made by the employer do not amount to evidence

of discrimination. Specifically, remarks that were in bad taste such as "how old you say this guy is" or "when does this guy say he's going to retire" were not considered direct evidence. Id. at 851. Moreover, a supervisor's alleged angry reference to an employee as "stupid old bastard" who was "burned-out and forgetful" did not establish direct evidence of discrimination. Id. Nor did the firm's statements that it was looking for "new blood" or "new leadership" constitute direct evidence of age discrimination. Id. at 853 n. 5.

It must be remembered that "Congress made plain that the age statute was not meant to prohibit employment decisions based on factors that sometimes accompany advancing age, such as declining health or diminished vigor and competence." Loeb v. Textron, Inc., 600 F.2d 1003 (1st. Cir. 1979); see also Young v. General Foods Corp., 840 F.2d 825 (11th Cir. 1988) (manager's comments that employee "moved in slow motion," and "was not proactive" and "was not

aggressive" did not constitute direct evidence of age discrimination); Berkowitz v. Allied Stores of Penn-Ohio, Inc., 541 F. Supp. 1209 (E.D.Pa. 1982)(executive's comment that employee had "been around since the dinosaurs roamed the earth" was insufficient to be direct evidence).

In the present case, there is no direct evidence of age discrimination. The record is replete with examples where Respondent reprimanded Petitioner prior to his termination because of inadequate performance, and Petitioner's acknowledgement thereto. (See Respondent's Memorandum of Law in Support of Motion for Summary Judgment at 5-6; and Respondent's Brief in the United States Court of Appeals for the Third Circuit at 6-7- Respondent's Appendix at 10(a)). In this context, the alleged statement regarding "a couple of young bucks" would pertain to Respondent's utter exasperation with Petitioner's failure to act vigorously and competently in the execution of his duties.

Perry supra at 851. Therefore, Petitioner's fabricated allegation regarding "a couple of young bucks" does not constitute direct evidence of age discrimination.

II. THE DISTRICT COURT PROPERLY DETERMINED THAT PETITIONER FAILED TO ESTABLISHED A PRIMA FACIE CASE OF AGE DISCRIMINATION.

Petitioner failed to establish a *prima facie* case of age discrimination because a preponderance of the evidence did not show that Petitioner was ultimately replaced by a younger employee. (Petitioner Appendix at 16(a)). One of Respondent's existing employees, who was roughly seven years older than Petitioner, indicated in a sworn affidavit and testified at a hearing in the related Preliminary Injunction case, that he assumed approximately 80-90% of the sales route that was formerly part of Petitioner's duties. (Petitioner Appendix at 16(a)-17(a)). Furthermore, the District Court concluded that a preponderance of the evidence indicated that another three of Respondent's employees, who were not in the protected

category, did not replace Petitioner. (Petitioner's Appendix at 17(a)-18(a)).

Respondent submits that Petitioner failed to establish a *prima facie* case under the framework established in McDonnell Douglas Corp v. Green, 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973); Gray v. New York Newspapers, Inc., 957 F.2d 1070 (3d Cir. 1992). Here, Petitioner could not demonstrate that he was replaced by a sufficiently younger person. Although this Honorable Court has allowed age discrimination claims involving the replacement by someone within the protected class, this does not apply in these circumstances whereby Petitioner was replaced by an employee who was substantially older. cf. O'Connor v. Consolidated Coin Caterers, 1996 U.S. Lexis 2168 (April 1, 1996/ No. 95-354). Therefore, summary judgment was appropriate in the case at bar.

Furthermore, Petitioner attempts to mislead this Honorable Court by alleging that the District Court failed to hold an *in camera*

hearing. (Petition at 14-16). However, the record reflects that the Petitioner never filed a Motion to Compel the Production of the "monthly products summary report". (See Respondent's Third Circuit Brief at 4-Respondent's Appendix at 16(a)). In addition, Petitioner never made a formal request for an *in camera* inspection of records; nor did Petitioner ever file an Affidavit for a Continuance of the Determination of Respondent's Motion for Summary Judgment pursuant to F.R.Civ.P. 56(f) in order to obtain additional documents. As a result, Petitioner failed to preserve this issue for appeal.

III. THE DISTRICT COURT PROPERLY DETERMINED THAT RESPONDENT ESTABLISHED LEGITIMATE BUSINESS REASONS FOR THE TERMINATION, AND THAT AGE WAS NOT A DETERMINATIVE FACTOR IN THE TERMINATION OF PETITIONER.

Petitioner misconstrues the law under ADEA by condemning the District Court for finding that "the weight of the evidence" indicates that Petitioner's job performance was unsatisfactory. (Petition at 16-18).

This Honorable Court has held that there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 91 L.Ed.2d 202, 106 S.Ct. 2505 (1986). If the claim is merely colorable, or is not significantly probative, summary judgment may be granted. Id. In this case, the Petitioner has failed to present sufficient evidence to demonstrate that there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317, 912 L.Ed.2d 265, 106 S.Ct. 2548 (1986).

It is well-established law that if the employee establishes a *prima facie* case, the burden then shifts to the employer to dispel the inference by articulating legitimate, non-discriminatory business reasons for the employee's dismissal. McDonnell Douglas supra 411 U.S. at 802. If this burden is met by the employer, the employee is then required to demonstrate, by a preponderance of the evidence,

that the articulated reasons are a pretext for the discrimination. Teamsters v. United States, 431 U.S. 324, 52 L.Ed.2d 396, 97 S.Ct. 1843 (1977). Furthermore, the employee has the burden of proving that age was the determinative factor in the employer's decision to terminate the employee. Gray supra. at 1078.

In this case, Petitioner failed to establish any evidence showing that a discriminatory reason motivated Respondent in the termination. There was no pattern of discrimination in Respondent's employment practices, and Petitioner offered no evidence that the termination of Petitioner was due to his age. (Petitioner's Appendix at 28(a)-29(a)).

It was uncontroverted in the record that Petitioner's sales in Territory 60 were grossly deficient. It was further established by a preponderance of the evidence that Petitioner's performance was unsatisfactory because of his failure to adhere to company policy, including

the number of required overnight visits, filing of weekly expense reports, insubordinate behavior and lackluster performance. (Petitioner's Appendix at 29(a)).

Therefore, Respondent set forth numerous legitimate, non-discriminatory reasons for Petitioner's termination, and Petitioner failed to establish any evidence indicating that Respondent's reasons for termination were not credible. Additionally, Petitioner failed to show that age was a determinative factor in his termination. As a result, summary judgment was appropriate in this case.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Respondent, Insulation
Corporation of America

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ORDER

The foregoing Motion is Denied. The supplemental appendix is received for the information of the Court only.

For the Court,

P. Douglas Sisk

Dec. 21, 1995

UNITED STATES COURT OF APPEAL
THIRD CIRCUIT

GARY L. BROBSTON,

Appellant

No. 95-1491

vs.

INSULATION CORP. OF AMERICA,
Appellee

APPELLANT'S MOTION TO FILE SUPPLEMENTAL APPENDIX

And now comes the Appellant, Gary L. Brobston, by and through his attorneys, Orloski & Hinga, and moves the Court for leave to file a Supplemental Appendix for the following reasons:

1. This case was orally argued before a three judge panel of **BECKER, J., ROTH, J.** and

LEWIS, J. on Monday, December 11, 1995.

2. At oral argument, the three judge panel express interest in the employer's **"young bucks"** statement to Appellant at time of termination, and if there was anything in the record to indicate whether or not the Appellant made this claim prior to his affidavit in opposition to the Defendant's Motion For Summary Judgment.

3. In the official documents filed with the E.E.O.C., Appellant, **personally**, wrote a letter dated June 20, 1994 directly to the E.E.O.C. without the involvement of counsel wherein this exact verbiage was used:

> "On August 16th, 1993 I was terminated from my employment by Mr. Tom Higgins, President of Insulation Corp. of America, and this was witnesses by M. William Dean, Executive Vice President of Insulation Corp. of America. The reason given to me for the termination was that the company could not afford me anymore, and the **'for what I was being paid they could hire a couple of young bucks'**. At that time I offered to take a paycut if that would help, but to no avail."
>
> Letter, Brobston to Lamb, E.E.O.C., June 20, 1994

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

GARY L. BROBSTON,	:	CIVIL ACTION
	:	
Plaintiff	:	No. 94-3315
	:	
vs.	:	
	:	
INSULATION CORPORATION OF AMERICA,	:	JURY TRIAL DEMANDED
	:	
Defendant	:	

DEFENDANT, INSULATION CORPORATION OF AMERICA'S MOTION FOR SUMMARY JUDGMENT

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para. 7-18; Higgins Aff. at para. 3-9; Brobston N.T. 38, 56-60, 67-69, 75-77, 83-87, 89-91; Tshudy N.T. at 33; Boston N.T. at 22 - See Exhibits 7,8, & 15).

Plaintiff's performance as Vice-President of Specialty Products was grossly inadequate because there were negligible sales in Territory 60 during his tenure from November 1992 until August of 1993. (Dean Aff. at para. 13; Higgins Aff. at para. 3-7,9 -See Exhibits 7 & 8). Furthermore, the increase in Territory 80 was not attributable to the efforts of Mr. Brobston. Rather, the growth was due to the curing of a product defect, and the efforts of Mr. Dean whereby he negotiated a contract with a significant customer, Atlantic Packaging. (Dean Aff. at para. 14; Higgins Aff. at para. 8 - See Exhibits 7 &8).

Mr. Brobston was reprimanded on numerous occasions for his inadequate performance. (Dean Aff. at para. 7,8,11,12,15; Higgins Aff. at para. 4-7, Brobston N.T. at 84-87 - See

Exhibits 7, 8 &16). Mr. Brobston lacked the honesty and integrity to maintain his position at ICA which is illustrated by his attempt to disclose confidential business information before (Dean Aff. at para. 4,5 -See Exhibit 7) and after his termination at ICA. (Dean Aff. at para. 16 - See Exhibit 7). The unscrupulous conduct of Brobston is further underscored by his blatant disregard of refusing to return confidential ICA business records which allegedly were discovered in his closet at home. (Dean Aff. at para. 17; Brobston N.T. 91-94/Brobston Ex. 2 - See Exhibits 7 & 17). Mr. Dean submits that Brobston is using these legal proceedings as a mere subterfuge in

IN THE COURT OF COMMON PLEAS OF LEHIGH COUNTY
PENNSYLVANIA

CIVIL DIVISION

INSULATION CORPORATION OF AMERICA, Plaintiff	:	93-E-107
v.	:	
GARY L. BROBSTON, Defendant	:	

ORDER

NOW, this 27 day of March, 1996, the Court finds the defendant, Gary Brobston, in contempt of court. The parties, by praecipe for hearing, may request that the Court impose sanctions for the contempt only if:

1) Defendant does not immediately cease and desist from disclosing or utilizing, in any fashion, all information contained in the document regarding sales territory 80 which document was the subject of this hearing; and

2) Defendant does not, within ten (10) days, deliver this document and all copies of it to plaintiff's counsel. The plaintiff's

request for counsel fees and costs is denied.[1]

---

[1] The defendant, Gary Brobston, was employed by Insulated Corporation of America (hereafter "ICA") from October of 1982 to August of 1993. During the course of his employment, the defendant entered an employment contract, which contained a covenant not to compete. In addition, the employment contract contained a provision that all documents and confidential information used in the course of the defendant's employment remained the property of ICA and were not to be removed from the company's premises without prior written permission. Such information was not to be used or disclosed to anyone except in the course of the defendant's employment.

On August 13, 1993, the defendant was terminated from his employment with ICA. After his termination from ICA, the defendant began working for New England Foam Plastics (hereafter "NEFP").

The document in question contains information regarding the defendant's sales performance in territory 80. The document also contains information regarding yearly sales, selling prices and product information. Both parties are in agreement that this document contains confidential information and should have been turned over at the time of the defendant's termination.

The defendant claims he found the document in question in a closet approximately three and one-half months after he was terminated from ICA. After finding the document, the defendant placed the document in a drawer and

forgot about it.

While working for NEAP, the defendant contacted certain customers of ICA. The defendant alleges he did not use information contained in the confidential document to do so nor did he give NEAP the confidential document or reveal any of its content. By the evidence, we are not convinced otherwise.

On December 30, 1993, after full hearing, the Court granted ICA's request for a preliminary injunction upholding the restrictive covenant in the defendant's employment contract. The defendant was enjoined from using or disclosing any confidential information obtained during the course of his employment with ICA and from competing with ICA within a 300 mile radius of Allentown.

On or about May 27, 1994, the defendant filed a complaint in the United States District Court alleging he was terminated on the basis of age. During the defendant's deposition in the federal action, the defendant produced the confidential ICA business record in question. A summary judgment motion of ICA was granted and the suit was dismissed.

After discovering the defendant was in possession of the subject document, the attorney for ICA requested that the attorney for the defendant return to ICA the confidential business document. Defendant's attorney refused. As a result, on March 30, 1995, ICA filed a motion to hold the defendant in contempt of the December 30, 1993 injunction.

9(a)

By the Court:

/s/William E. Ford, J.

On April 10, 1995, a hearing was held on ICA's petition for contempt. During the defendant's testimony, the defendant stated that, if he knew he had this document when he was terminated, it was the type of document that should have been turned over to ICA. Therefore, the defendant must deliver the document and all copies of it within ten (10) days to ICA's counsel.

ICA's request for costs and counsel fees is DENIED. "Costs are not of course in equity. They may be given or withheld as equity and good conscience require." Pile v. Pedrick, 167 Pa. 296, 300, 31 A. 646, 647 (1895).

Costs are denied because, although the defendant admits he is in possession of the document, ICA failed to demonstrate that defendant utilized or disclosed the information contained in the document. Actually, it is this lack of proof of use of the document that causes us not to presently impose sanctions. Counsel fees are denied because counsel fees in equity are generally not allowable as costs associated with the action except under limited circumstance, none of which is applicable here. Hempstead v. Meadville Theological School, 286 Pa. 493, 134 A. 103 (1926).

10(a)

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

GARY L. BROBSTON,	:	CIVIL ACTION
	:	
Plaintiff	:	No. 94-3315
	:	
vs.	:	
	:	
INSULATION CORPORATION OF AMERICA,	:	JURY TRIAL DEMANDED
	:	
Defendant	:	

DEFENDANT, INSULATION CORPORATION OF AMERICA'S MOTION FOR SUMMARY JUDGMENT

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para. 7-18; Higgins Aff. at para. 3-9; Brobston N.T. 38, 56-60, 67-69, 75-77, 83-87, 89-91; Tshudy N.T. at 33; Boston N.T. at 22 - See Exhibits 7,8, & 15).

Plaintiff's performance as Vice-President of Specialty Products was grossly inadequate because there were negligible sales in Territory 60 during his tenure from November 1992 until August of 1993. (Dean Aff. at para. 13; Higgins Aff. at para. 3-7,9 -See Exhibits 7 & 8). Furthermore, the increase in Territory 80 was not attributable to the efforts of Mr. Brobston. Rather, the growth was due to the curing of a product defect, and the efforts of Mr. Dean whereby he negotiated a contract with a significant customer, Atlantic Packaging. (Dean Aff. at para. 14; Higgins Aff. at para. 8 - See Exhibits 7 &8).

Mr. Brobston was reprimanded on numerous occasions for his inadequate performance. (Dean Aff. at para. 7,8,11,12,15; Higgins Aff. at para. 4-7, Brobston N.T. at 84-87 - See

Exhibits 7, 8 &16). Mr. Brobston lacked the honesty and integrity to maintain his position at ICA which is illustrated by his attempt to disclose confidential business information before (Dean Aff. at para. 4,5 -See Exhibit 7) and after his termination at ICA. (Dean Aff. at para. 16 - See Exhibit 7). The unscrupulous conduct of Brobston is further underscored by his blatant disregard of refusing to return confidential ICA business records which allegedly were discovered in his closet at home. (Dean Aff. at para. 17; Brobston N.T. 91-94/Brobston Ex. 2 - See Exhibits 7 & 17). Mr. Dean submits that Brobston is using these legal proceedings as a mere subterfuge in order to inflict further incalculable damage on ICA especially upon the fast approaching expiration of the covenant not to compete in August of 1995. (Dean Aff. at para. 18 - See Exhibit 7).

Alan Colorito began his employment at ICA on March 22, 1993. (Colorito N.T. at 7 - See Exhibit 18). He replaced Gregory Kester in the

roofing sales position at ICA. (Colorito N.T. 14, 17 - See Exhibit 19). Mr. Colorito was the only person who covered the approximate 75-80 roofing accounts in Territory 90. (Colorito N.T. 17, 24; Brobston N.T. at 25; Tshudy N.T. at 32 - See Exhibit 20). Joyce Tshudy handled the commodity sales in territory 10; Michael Marsh handled the commodity and national accounts in territories 20 & 30; and Gary Brobston covered sales in territories 60 & 80. (Brobston N.T. at 25-27/Brobston Ex. 1 - See Exhibit 21). Mr. Brobston estimated that the total number of ICA customers in territory 80 was only 15 percent; and only a meager 2 percent were located in territory 60. (Brobston N.T. 27-29 - See Exhibit 22). Brobston further testified that there was no appreciable increase in the 2 percent of customers located in territory 60 during the time period that he was in charge from 1992 until August of 1993. (Brobston N.T. at 29 - See Exhibit 23). Brobston never met the projected budget during any of the months in

1993 for territory 60. (Brobston N.T. 57-59 - See Exhibit 24).

When Brobston left, Mr. Colorito only took over one (1) of his accounts. (Colorito N.T. at 29 - See Exhibit 25). Joyce Tshudy estimated that she only received about eight (8) of Brobston's accounts when he departed. (Tshudy N.T. at 27 - See

15(a)

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 95-1491

GARY L. BROBSTON,

Appellant

vs.

INSULATION CORPORATION OF AMERICA, INC.

Appellee

APPELLEE'S BRIEF

Appeal from the Order of the United States District Court for the Eastern District of Pennsylvania per the Honorable Arnold C. Rapoport, United States Magistrate Judge, dated May 23, 1995, denying Plaintiff's Motion To Reconsider Order of April 5, 1995 granting Defendant's Motion for Summary Judgment.

Howard S. Stevens,
Attorney for Defendant
/Appellee

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Allentown, PA 18101
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case No. 94-3315, ICA filed a Motion for Summary Judgment. On April 5, 1995, the District Court granted ICA'S Motion for Summary Judgment. On May 23, 1995, the District Court denied Plaintiff's Motion to Reconsider the order granting Summary Judgment.

On or about May 25, 1995, Brobston filed the herein appeal with this Honorable Court. In his Brief, Brobston makes repeated unverified assertions that he should have been entitled to take the deposition of ICA employee, Michael Marsh; and ICA should have produced a "Monthly Product Summary Report" (Appellant's Brief at 2, 7, 10, 19, 21, 22-24). However, Brobston never filed a Motion to Compel the production of this alleged "Monthly Product Summary Report". (See docket entries--R. at 1a-4a). Also, he never issued a notice for the deposition of Michael Marsh either before or after the close of discovery. Furthermore, Brobston failed to file an affidavit for a continuance of the determination of ICA's Motion for Summary

Judgment pursuant to F.R.Civ.P. 56(f) in order to obtain additional documents or to take depositions. Id. As a result, Brobston has failed to preserve this issue for appeal.

customers, refusing to consistently submit call reports and expense accounts on a weekly basis, spending too much time at the plant in Allentown, failing to adequately call on customers, making overcharges and improperly using the ICA credit card. (Dean Aff.--ICA Supp. R. at 506a-511a; Higgins Aff.--R. at 126a-130a; Brobston N.T.--R. at 155a-174a; Tshudy N.T.--R. at 175a; Boston N.T.--R. at 176a).

Brobston's performance as Vice-President of Specialty Products was grossly inadequate because there were negligible sales in Territory 60 during his tenure from November 1992 until August of 1993. (Dean Aff.--ICA Supp. R. at 509; Higgins Aff.--R. at 126a-130a). Furthermore, the increase in Territory 80 was not attributable to the efforts of Mr. Brobston. Rather, the growth was due to the curing of a product defect, and the efforts of Mr. Dean whereby he negotiated a contract with a significant customer, Atlantic Packaging. (Dean Aff.--ICA Supp. R. at 509-510; Higgins Aff.--R.

at 127a-130a).

Mr. Brobston was reprimanded on numerous occasions for his inadequate performance. (Dean Aff.--ICA Supp. R. at 506a-510a; Higgins Aff.--R. at 126a-130a, Brobston N.T.--R. at 168a-171a). Mr. Brobston lacked the honesty and integrity to maintain his position at ICA which is illustrated by his attempt to disclose confidential business information before (Dean Aff.--ICA Supp. R. at 506a) and after his termination at ICA. (Dean Aff.--ICA Supp. R. at 510a-511a). The unscrupulous conduct of Brobston is further underscored by his blatant disregard of refusing to return confidential ICA business records which allegedly were discovered in his closed at home. (Dean Aff. at para. 17; Brobston N.T.--R. at 177a-182a). Mr. Dean submits that Brobston is using these legal proceedings as a mere subterfuge in order to inflict further incalculable damage on ICA especially upon the fast approaching expiration of the covenant not

to compete in August of 1995. (Dean Aff. at para. 18--ICA Supp. R. at 511a).

Alan Colorito began his employment at ICA on March 22, 1993. (Colorito N.T.--R. at 187a). He replaced Gregory Kester in the roofing sales position at ICA. (Colorito N.T.--R. 1881-189a). Mr. Colorito was the only person who covered the approximate 75-80 roofing accounts in Territory 90. (Colorito N.T.--R. at 190a-191a; Brobston N.T.--R. at 192a; Tshudy N.T.--R. at 193a). Joyce Tshudy handled the commodity sales in territory 10; Michael Marsh handled the commodity and national accounts in territories 20 & 30; and Gary Brobston covered sales in territories 60 & 80. (Brobston N.T.--R. at 194a-197a). Mr. Brobston estimated that the total number of ICA customers in territory 80 was only 15 percent; and only a meager 2 percent were located in territory 60. (Brobston N.T.--R. at 198a-200a). Brobston further testified that there was no appreciable increase in the 2 percent of customers located in territory 60

during the time period that he was in charge from 1992 until August of 1993. (Brobston N.T.--R. at 200a). Brobston never met the projected